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In the Supreme Court of the United States

OCTOBER TERM, 1978

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	20

CITATIONS

Cases:

Abney v. *United States*, 431 U.S. 651	12
Benjamin, In re, 582 F.2d 121	15
Cobbledick v. *United States*, 309 U.S. 323	8, 12, 13
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	11
Community Broadcasting of Boston, Inc. v. *FCC*, 546 F.2d 1022	14
Coopers & Lybrand v. *Livesay*, No. 76-1836 (June 21, 1978)	13
Coson v. *United States*, 533 F.2d 1119	17, 19
Gelbard v. *United States*, 408 U.S. 41	8
Gopman, In re, 531 F.2d 262	15
Grand Jury Impaneled January 21, 1975, In the Matter of, 536 F.2d 1009	9, 15
Grand Jury Impaneled January 21, 1975, Matter of, 541 F.2d 373	9, 10
Grand Jury Investigation, In re, 576 F.2d 1071, cert. denied, No. 77-1868 (November 6, 1978)	16

Cases—Continued — Page

Grand Jury Proceedings, In re, 580 F.2d 13 9
Grand Jury Proceeding, In re, 528 F.2d 983 19
Grand Jury Subpoenas, April, 1978, at Baltimore, In re, 581 F.2d 1103, petition for a writ of certiorari pending (No. 78-1055) 18, 19
Grand Jury Subpoena Served on John Doe, In re, 546 F.2d 498 9
Investigation Before the April 1975 Grand Jury, In re, 531 F.2d 600 15
Investigation Before the February, 1977, Lynchburg Grand Jury, In re, 563 F.2d 652 14-15
Kerr v. *United States District Court*, 426 U.S. 394 13
Latham v. *United States*, 226 F. 420 12
Melamed v. *ITT Continental Baking Co.*, 534 F.2d 82 14
Perlin, In re, No. 78-2139 (7th Cir. October 4, 1978) 13, 17, 19, 20
Perlman v. *United States*, 247 U.S. 7 10
Roche v. *Evaporated Milk Assn.*, 319 U.S. 21 13
Silver Chrysler Plymouth, Inc. v. *Chrysler Motors Corp.*, 496 F.2d 800 14
Special February 1977 Grand Jury, In re, 581 F.2d 1262 16
Special March 1974 Grand Jury, In re, 541 F.2d 166, cert. denied, 430 U.S. 929 ..... 18, 19
Taylor, In re, 567 F.2d 1183 15
United States v. *Calandra*, 455 F.2d 750, rev'd on other grounds, 414 U.S. 338 ..... 7, 8

Cases—Continued — Page

United States v. *Dionisio*, 410 U.S. 1 8
United States v. *Dondich*, 460 F. Supp. 849 ..... 12, 20
United States v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, cert. denied, 414 U.S. 832 18
United States v. *Evans*, 526 F.2d 701, cert. denied, 429 U.S. 818 17
United States v. *Hoffa*, 349 F.2d 20, aff'd, 385 U.S. 293 18
United States v. *LaSalle National Bank*, No. 77-365 (June 19, 1978) 20
United States v. *MacDonald*, 435 U.S. 850 ..... 12, 15
United States v. *Neiberger*, 460 F.2d 290 7
United States v. *Nixon*, 418 U.S. 683 11
United States v. *Procter & Gamble Co.*, 356 U.S. 677 18
United States v. *Ryan*, 402 U.S. 530 ..... 8, 11, 15
United States v. *Universal Mfg. Co.*, 525 F.2d 808 17-18
Will v. *Calvert Fire Ins. Co.*, No. 77-693 (June 23, 1978) 13
Witte v. *United States*, 544 F.2d 1026 19

Statutes and rules:

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 8
18 U.S.C. (1964 ed.) 2514 8
18 U.S.C. 3731 8
28 U.S.C. 515 3
28 U.S.C. 515(a) 17
28 U.S.C. 543 ..... 3, 17
28 U.S.C. 1291 ..... 2, 4, 5, 9, 10, 11, 13, 14

Statutes and rules—Continued — Page

28 U.S.C. 1292(b) ..... *passim*
Fed. R. Crim. P.:
Rule 6(d) 17
Rule 6(e) 18
Rule 6(e)(2)(C)(i) 19
Rule 54(c) 16

Miscellaneous:
ABA Code of Professional Responsibility:
Canon 4 19
Canon 5 19
H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) 17, 20
Moore's Federal Practice (2d ed. 1973) 11
S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977) 18, 19, 20

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OPINIONS BELOW

The oral opinion of the district court (Pet. App. D1-D17) is not reported. The original panel opinion of the court of appeals (Pet. App. C1-C24) is reported at 573 F.2d 936. The opinion of the court of appeals on rehearing *en banc* (Pet. App. B1-B44) is reported at 584 F.2d 1366.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on September 7, 1978 (Pet. App. B1). By

order of Mr. Justice Stewart dated September 27, 1978, the time for filing a petition for a writ of certiorari was extended until November 6, 1978. The petition was filed on November 3, 1978. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court order refusing to disqualify an Internal Revenue Service attorney appointed under the authority of the Attorney General to represent the government in a grand jury criminal tax investigation is reviewable by a court of appeals as an order in a "civil action" under 28 U.S.C. 1292(b).

2. Whether such an order is a final decision of the district court appealable to the court of appeals under 28 U.S.C. 1291.

3. Whether an attorney employed by the Internal Revenue Service may be appointed as a special attorney under the authority of the Attorney General to assist in the representation of the government in a grand jury criminal tax investigation.

STATEMENT

1. In December 1977, based upon evidence gathered during an investigation of petitioner, special agents of the Intelligence Division of the Internal Revenue Service recommended to the Regional Counsel, Internal Revenue Service, Central Region, that a grand jury investigation be instituted to consider whether petitioner had committed criminal violations of the internal revenue laws. Upon receipt of the

recommendation, the Regional Counsel assigned the matter to one of his staff attorneys, Meno W. Piliaris. After reviewing the evidence obtained up to that time, Piliaris prepared a letter advising the Department of Justice that sufficient evidence existed to warrant criminal investigation by a grand jury (Pet. App. C2-C3). Upon independent consideration of the Internal Revenue Service's recommendation, the Department of Justice approved the commencement of a grand jury investigation of petitioner. In April 1977, a grand jury was empanelled in the United States District Court for the Eastern District of Michigan (Pet. App. B2).

2. The Acting Assistant Attorney General in charge of the Tax Division of the Department of Justice assigned two attorneys to conduct the investigation. Recognizing that the investigation would involve complex tax matters and numerous exhibits, the Tax Division attorneys requested the assistance of Piliaris, who is an experienced tax attorney and a certified public accountant and who was somewhat familiar with the proposed criminal investigation (R. 174, 239).[1] Thereafter, pursuant to the authority of 28 U.S.C. 515 and 543, Acting Associate Attorney General Philip H. Modlin appointed Piliaris to be a special attorney, empowered to assist the two Justice Department attorneys in the conduct of the grand jury investigation (Pet. App. G1). Piliaris thereupon took the oath of office as a special attorney

[1] "R." refers to the record appendix filed in the court of appeals.

before the Chief Judge of the United States District Court for the Eastern District of Michigan (R. 176). After his appointment, Piliaris continued to be employed and paid by the Internal Revenue Service. He was, however, aware of the need to preserve grand jury secrecy. As a result, Piliaris was instrumental in setting up procedures in this case to avoid improper disclosures of grand jury evidence by Internal Revenue agents (R. 106-108). As an additional precaution, the government removed Piliaris from any participation in civil tax matters concerning petitioner (R. 212-214).

3. Following receipt of the initial round of grand jury subpoenas, petitioner moved to quash the subpoenas and for protective orders, charging abuses of the grand jury's process (Pet. App. D3, D16-D17). In one of its motions for a protective order, petitioner challenged the appointment and presence in the grand jury room of Special Attorney Piliaris. The district court denied petitioner's motions to quash the subpoenas and to bar Piliaris from participating in the investigation (Pet. App. D16).

Petitioner sought immediate review of the district court's order under 28 U.S.C. 1291 and further requested the district court to certify interlocutory appeals of each order under 28 U.S.C. 1292(b) (Pet. App. B2). The district court agreed to certify an appeal under 28 U.S.C. 1292(b) with respect to the Piliaris matter (Pet. App. E1-E3), but it refused

to certify appeals of the other orders.[2] The court of appeals granted petitioner's request under 28 U.S.C. 1292(b) for permission to appeal the question of Piliaris' participation in the grand jury investigation. However, it dismissed petitioner's 28 U.S.C. 1291 appeal for lack of jurisdiction (Pet. App. F1-F2). A divided panel of the court of appeals subsequently agreed that it had jurisdiction to hear an interlocutory appeal of the order refusing to disqualify Piliaris. On the merits, it reversed the district court's order and ordered the grand jury investigation terminated (Pet. App. C1-C15). The dissenting judge concluded that the district court's order was not reviewable under the Interlocutory Appeals Act, or as a final decision under 28 U.S.C. 1291, or on mandamus (Pet. App. C17-C20). He further expressed the view that Piliaris' status as an Internal Revenue Service employee did not require his disqualification or the termination of the grand jury investigation (Pet. App. C20-C24).

On the government's motion, the court of appeals vacated the panel decision and ordered rehearing *en banc*. Thereafter, by a 5-2 vote, the court of appeals held that the district court's order was not review-

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[2] The district court refused to certify under 28 U.S.C. 1292(b) two other orders: (1) an order denying petitioner's motion to quash grand jury subpoenas (Pet. App. D3); and (2) an order granting, in part, petitioner's motion for a protective order but permitting the use of some Internal Revenue Service personnel upon the government's *ex parte* showing of need for each individual (Pet. App. D3, D10). Petitioner subsequently complied with the grand jury subpoenas.

able as an interlocutory appeal under 28 U.S.C. 1292 (b) because the statute is limited to orders entered in civil actions. As the court observed, "it seems self-evident that a grand jury investigation of possible criminal tax violations should not be characterized as a 'civil action' under § 1292(b) and that we lack jurisdiction under the Interlocutory Appeals Act" (Pet. App. B4). The *en banc* court therefore ruled that the panel's original certification of the appeal under 28 U.S.C. 1292(b) was improvidently granted and it dismissed the appeal (Pet. App. B1-B8).

In a separate concurring opinion, two judges expressed the view that the appointment, under the authority of the Attorney General, of a federal attorney assigned to the Internal Revenue Service to assist in a criminal tax investigation through grand jury proceedings was not an abuse of the grand jury process that called for the issuance of a writ of mandamus (Pet. App. B9-B12).

The dissenting judges concluded that the court of appeals had jurisdiction to consider the appeal and that the IRS attorney should not have been permitted to assist in the grand jury investigation (Pet. App. B13-B34).[3]

[3] Petitioner correctly states (Pet. 7) that the grand jury term has expired. The Department of Justice, however, is actively considering whether to continue the investigation, and it is possible that the case will be presented to a successor grand jury.

ARGUMENT

1. Petitioner argues (Pet. 8-12) that the court of appeals erred in holding that it lacked jurisdiction to hear petitioner's interlocutory appeal under 28 U.S.C. 1292(b) because the district court's order was not entered in a "civil action." The Court need not consider the propriety of this ruling, however, because, even assuming that a grand jury investigation could be characterized as a "civil action" within the meaning of Section 1292(b), the court of appeals properly exercised its discretion under the statute to dismiss the appeal on the ground that the resolution of the issue would not " 'materially advance the ultimate termination of the litigation' " (see Pet. App. B5). As the court observed, "[t]o allow an appeal when the District Court has refused to disqualify a government lawyer from a grand jury investigation simply disrupts the investigation and creates the possibility that the target of the inquiry—by the threat of delay and protracted legal maneuvering—will exert unwarranted influence in the government's choice of its prosecuting attorney" (Pet. App. B5-B6).[4] This Court has repeatedly rejected similar at-

[4] *United States* v. *Calandra*, 455 F.2d 750, 752-753 (6th Cir. 1972), rev'd on other grounds, 414 U.S. 338 (1974), and *United States* v. *Neiberger*, 460 F.2d 290, 292 (6th Cir. 1972), upon which petitioner relies (Pet. 9), are not to the contrary. Neither case involved the certification of an appeal under Section 1292(b) or the question of what constitutes a "civil action" under that provision. In *Calandra*, the court held that the government could appeal from an order granting a grand jury target's pre-indictment motion to suppress evi-

tempts by targets of grand juries to take multiple "piecemeal" appeals that would result in the "protracted interruption of grand jury proceedings" (*Gelbard* v. *United States*, 408 U.S. 41, 70 (1972) (White, J., concurring)) and thereby provide an "[o]pportunity for obstructing the 'orderly progress' of investigation." *Cobbledick* v. *United States*, 309 U.S. 323, 325, 327 (1940). See also *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *United States* v. *Dionisio*, 410 U.S. 1, 16-18 (1973). Here, petitioner possesses adequate appellate remedies at an appropriate point in the proceedings after indictment and conviction or on appeal from a contempt citation for review of its claim that the IRS attorney should not have participated in the grand jury investigation. Accordingly, the court of appeals correctly refused to

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dence and to return property. There, the court rejected the contention that the statutory basis for jurisdiction (18 U.S.C. 3731) authorizes an appeal by the government from a suppression order only in a criminal case and that the motion was not filed in a criminal case. In so holding, the court observed that "[a] Grand Jury investigation might well be regarded as a criminal proceeding, particularly by the person who is the subject of it" (455 F.2d at 752).

Neiberger is likewise distinguishable. In that case, the court held that a district court's order refusing to grant immunity to two grand jury witnesses in a proceeding instituted under 18 U.S.C. (1964 ed.) 2514 was a final decision in a civil action that was reviewable on appeal. The immunity statute involved in that case has since been repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 930. In any event, to the extent that *Neiberger* suggests that an order entered during the course of a grand jury proceeding is appealable under 28 U.S.C. 1292(b), it has been overruled by the *en banc* decision in this case.

accept jurisdiction under Section 1292(b) at this preliminary stage of the case.

2. Contrary to petitioner's contention (Pet. 9), the decision below does not conflict with either *Matter of Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *In re Grand Jury Subpoena Served on John Doe*, 546 F.2d 498 (2d Cir. 1976); or *In re Grand Jury Proceedings*, 580 F.2d 13 (1st Cir. 1978). In the first case, the court reviewed an order of the district court denying a motion to quash a grand jury subpoena directed to the custodian of records of a person under investigation. Although the district court certified on request of the custodian the order to the court of appeals under 28 U.S.C. 1292(b), and the Third Circuit granted the custodian's petition to appeal ~~from~~ under that provision (see 541 F.2d at 376), it did so without any discussion of the question presented here—whether a grand jury proceeding is a "civil action" under that provision. The only explicit ruling with respect to jurisdiction in that case is the holding of the court of appeals on the appeal of the person under investigation that it had jurisdiction to review the district's order as an appeal as a matter of right from a "final decision" of the district court under 28 U.S.C. 1291 (see 541 F.2d at 377 n.4).[5]

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[5] *In re Grand Jury Subpoena Served on John Doe, supra*, and *In re Grand Jury Proceedings, supra*, are not to the contrary but in fact support the decision below. In the former case, the Second Circuit dismissed an appeal from an order of the district court refusing to enjoin a grand jury investigation. In so holding, the court stated that it did not have

There is, moreover, no conflict between the decision below and the Third Circuit with respect to jurisdiction under 28 U.S.C. 1291.[6] The court below correctly concluded that the district court's order refusing to disqualify the IRS attorney was not a "final decision" appealable as a matter of right under Section 1291 (see Pet. App. B6-B7). Unlike the situation considered by the Third Circuit in *Matter of Grand Jury Impaneled January 21, 1975, supra*, the court here properly pointed out that petitioner would be able to raise the disqualification of counsel issue after indictment and conviction or on appeal from a contempt citation. In the Third Circuit case, by contrast, the district court's order upheld a subpoena directing a third party to produce records that were the property of a person under investigation and that he claimed were immune from production. In that special situation, this Court has held that denial of immediate review would render the owner of the records "powerless to avert the mischief of the order" (*Perlman* v. *United States*, 247 U.S. 7, 13 (1918)) "for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). See also *United States* v. *Nixon*, 418 U.S. 683, 691 (1974). There is accordingly no conflict between the decision below and the Third Circuit with respect to jurisdiction under Section 1291.

jurisdiction under Section 1292(b) because the district court had not certified its order and the appellants did not request that it do so. Similarly, in the latter case, the First Circuit held that an order denying a petition for disclosure of grand jury materials was not appealable as a final order under Section 1291.

[6] Originally, an administrative panel of the court of appeals dismissed petitioner's appeal under Section 1291 in the same order that certified the Section 1292(b) appeal (Pet. App. F1-F2). Petitioner did not appeal that dismissal. However, since the *en banc* court rejected the Section 1292(b) appeal, it reached the question of appealability under Section 1291 "as a matter of fairness" (Pet. App. B6).

3. a. Petitioner likewise errs in contending (Pet. 13-14) that the court of appeals had jurisdiction under the collateral order doctrine in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). There, the Court held that an appeal could be taken under Section 1291 from an order of a district court denying a corporation's motion that the plaintiff in a stockholder's derivative suit be required, pursuant to a state statute, to give security for reasonable expenses of the defendants. In so ruling, the Court concluded that "[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). As Professor Moore has stated, there are three requirements for appellate jurisdiction under the collateral order doctrine (*Federal Practice* ¶ 110.10, at 133 (2d ed. 1973)):

> (1) the order must be a final determination of a claim of right "separable from, and collateral to," rights asserted in the action; (2) it must

> be "too important to be denied review," in the sense that it "presents a serious and unsettled question"; and (3) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review the * * * order and rights conferred * * * will have been lost, probably irreparably."

See *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

Here, as the court of appeals correctly concluded, petitioner can raise the disqualification of counsel issue after indictment and conviction or on appeal from a contempt citation for refusing to obey grand jury subpoenas. Thus, even on the assumption that the district court's order is collateral and presents an important unsettled question, it can await consideration in the course of the normal appellate process. "These are the usual remedies, and they are adequate" (Pet. App. B5). The propriety of the IRS attorney's participation in the grand jury investigation will merge into the question of the validity of any ensuing indictment (see, *e.g.*, *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915); *United States* v. *Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978)) and therefore " 'remains open, unfinished [and] inconclusive' until the trial court has pronounced judgment." *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978). "That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 327-328. "Whatever right

* * * [petitioner] may have requires no further protection * * * than that afforded by the district court * * *" until a finding of contempt for refusing to comply with grand jury subpoenas (see *In re Perlin*, No. 78-2139 (7th Cir. Oct. 4, 1978), slip op. 5, or a criminal conviction is entered (*United States* v. *Dondich*, *supra*). See *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328. In sum, the disqualification of counsel issue is not one that will be "destroyed if it were not vindicated before trial" (*United States* v. *MacDonald*, *supra*, 435 U.S. at 860) but "is subject to effective review after final judgment * * *" (*Coopers & Lybrand* v. *Livesay*, No. 76-1836 (June 21, 1978), slip op. 5). There is accordingly no basis for interlocutory appellate jurisdiction under the collateral order doctrine.[7]

b. In support of its claim that the court of appeals should have considered the attorney disqualification question as a "final decision" under Section 1291,

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[7] Petitioner also contends (Pet. 15-16) that the court of appeals erred in refusing mandamus and in not directing the district court to exclude Piliaris from participating in the grand jury proceeding. But petitioner never filed a petition for mandamus (Pet. App. B3 n.2). At all events, the court correctly noted that petitioner possesses adequate appellate remedies (Pet. App. B5) (see *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976)). Mandamus would therefore be inappropriate (see *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943)). Indeed, as the concurring judges concluded, the record in this case "demonstrates no 'exceptional condition,' no 'clear abuse of judicial discretion' or failure to exercise jurisdiction on the part of the District Judge and no denial of appellate review" (Pet. App. B12). See *Will* v. *Calvert Fire Ins. Co.*, No. 77-693 (June 23, 1978), slip op. 4-6.

petitioner further asserts (Pet. 13) the existence of a "general rule" prevailing in eight circuits that "all orders relating to attorney disqualification, whether disqualifying the attorney or allowing him to proceed, are always immediately appealable." In a supplemental memorandum, petitioner cites two recent decisions of the First and Seventh Circuits as evidence that (p. 6) "[t]he circuits are in hopeless disagreement as to their jurisdiction to hear appeals from orders respecting motions to disqualifying [sic] counsel in a grand jury setting * * *."

Contrary to petitioner's contention, there is no such "general rule." The decisions petitioner cites upholding the appealability of orders granting or denying disqualification motions are civil cases[8] in which the settled policy against interruption of a grand jury inquiry was not implicated. Moreover, for purposes of determining appealability under Section 1291, an order disqualifying [sic] counsel in a grand jury proceeding is distinguishable from one (as in the instant case) refusing to disqualify counsel. The decisions holding appealable orders disqualifying counsel have emphasized the fact that such orders are final and conclusive as to the particular attorney's representation and that they accordingly involve an important right that might be irretrievably lost if immediate review were denied. See *In re Investigation Before the February, 1977, Lynchburg Grand Jury*, 563 F.2d 652, 655 (4th Cir. 1977). See also *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); *In the Matter of the Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976). Contra: *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978).

[8] See Pet. 13 n.16, Pet. 14 n.18, and *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (*en banc*). Cf. *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1022 (D.C. Cir. 1976).

Here, on the other hand, the district court's order refusing to disqualify the IRS lawyer does not "involve[] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, *supra*, 435 U.S. at 860. Indeed, as we have pointed out above (see pages 8, 10, *supra*), petitioner need not submit to trial and conviction before raising its claim but can obtain expeditious review of its disqualification claim by appealing a contempt citation after refusing to comply with a grand jury subpoena. Thus, the court of appeals correctly held that this case does not fall within "the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims * * *" (*United States* v. *Ryan*, *supra*, 402 U.S. at 533) so as to justify interruption of a grand jury proceeding.

Finally, petitioner errs in characterizing the circuits as in disagreement on the question presented in this case. While the First Circuit in *In re Benjamin*, *supra*, has refused to follow the decisions of five courts of appeals holding that an order disqualifying

an attorney from representing the subject of a grand jury investigation is appealable, no circuit has held that the particular order at issue here—refusing to disqualify a government attorney from a grand jury proceeding—is appealable.[9] There is accordingly no conflict of decisions requiring resolution by this Court.

4. Given the absence of jurisdiction to consider petitioner's appeal at this stage of the proceeding, the court of appeals properly refrained from reaching the merits of its argument that the IRS attorney should have been disqualified from assisting in the grand jury investigation. It is apparent, however, that petitioner's disqualification claim is similarly without merit. Petitioner contends (Pet. 16-23) that the Attorney General has no power to appoint an attorney employed by the Internal Revenue Service to appear as an "attorney for the government" (Fed. R. Crim. P. 54(c)) before a grand jury investigat-

[9] Contrary to petitioner's argument (Supp. Mem. 2-4), *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978), does not conflict with the decision below. There, the court held appealable an order denying a government motion to disqualify an attorney from representing multiple witnesses in a grand jury proceeding. But the government could not have appealed the grand jury's failure to indict. And given the government's limited post-indictment appeal remedies in criminal cases, the government could have obtained review of the district court's order only by an immediate interlocutory appeal. Thus, unlike the instant case, denial of immediate review would have rendered impossible any review. Cf. *In re Grand Jury Investigation*, 576 F.2d 1071, 1072 (3d Cir. 1978) (appeal by government of orders denying disqualification on the ground that the orders were not ripe for judicial intervention dismissed as premature), cert. denied, No. 77-1868 (November 6, 1978).

ing possible tax crimes. In its view (Pet. 17), "[o]nly Justice Department attorneys may conduct grand jury investigations and criminal litigation."

But the Attorney General has specific statutory authority to "appoint attorneys to assist United States attorneys * * *" (28 U.S.C. 543), who "may * * * conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings * * *" (28 U.S.C. 515(a)). The purpose of these provisions is to permit the Attorney General to utilize the special skills and expertise of attorneys outside of the Justice Department (H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906)), and nothing in these statutes precludes the Attorney General from obtaining the services of attorneys employed by other government agencies, including the Internal Revenue Service (Pet. App. C8-C9). Indeed, in a recent decision, the Seventh Circuit rejected much the same claim with respect to the appearance before a grand jury of a Commodities Futures Trading Commission attorney who was appointed as a Special Assistant United States Attorney. *In re Perlin, supra.*[10] See also *Coson* v. *United States*, 533 F.2d 1119, 1120-1121 (9th Cir. 1976); *United States* v. *Evans*, 526 F.2d 701, 707 (5th Cir.), cert. denied, 429 U.S. 818 (1976); *United States* v. *Universal Mfg. Co.*, 525

[10] Petitioner's reliance (Pet. 17) upon cases holding that administrative agency attorneys are unauthorized persons in the grand jury room under Fed. R. Crim. P. 6(d) is misplaced. None of those decisions involved agency attorneys specially designated by the Attorney General under 28 U.S.C. 543 to appear before a grand jury. Compare *In re Perlin, supra*, slip op. 12-13.

F.2d 808, 812 (8th Cir. 1975); *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241, 1249 (5th Cir.), cert. denied, 414 U.S. 832 (1973).

Petitioner further argues (Pet. 19-20) that the presence of agency personnel threatens to breach the secrecy of the grand jury. But Rule 6(e) of the Federal Rules of Criminal Procedure provides sufficient safeguards against the improper disclosure of grand jury matters by empowering the courts to punish knowing violations as contempt. S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977). See, *e.g.*, *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F.2d 1103, 1110 (4th Cir. 1978), petition for a writ of certiorari pending (No. 78-1055); *In re Special March 1974 Grand Jury*, 541 F.2d 166, 170 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). As we noted above, Piliaris is fully aware of his obligations in this regard, and petitioner has offered nothing to suggest he will not honor them.[11]

[11] Petitioner complains (Pet. 19) that the Internal Reevnue Service Regional Counsel's grand jury recommendation letter to the Department of Justice contained a paragraph stating that "[a]t the appropriate time" it would ask the Justice Department to seek "an order * * * from the Court authorizing the disclosure of grand jury information to IRS under the provisions of Rule 6(e)" (Pet. App. D7). But not all civil disclosure of grand jury evidence to administrative agencies is unlawful. See, *e.g.*, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958); *In re Grand Jury Subpoenas, April, 1978, at Baltimore, supra*, 581 F.2d at 1109-1110. Here, the district court found that the grand jury investigation was being conducted for a proper criminal purpose (Pet. App. D6) and that there was "no evidence that the Justice Department in this case plans or intends to use the grand jury subpoenas to gather evidence not relating to its criminal investigation" (Pet. App. D7-D8). Indeed, the Internal Revenue Service's apparent intention to obtain *judicially supervised* disclosure of grand jury matters for civil law enforcement purposes was contemplated by Congress in its recent revision of Rule 6(e). See Fed. R. Crim. P. 6(e)(2)(C)(i); S. Rep. No. 95-354, *supra*, at 6, 8. There is nothing in the record to suggest that the government, if it does seek civil disclosure of grand jury evidence, intends to circumvent the limitations of Rule 6(e).

At all events, the mere possibility of improper civil use of grand jury evidence does not justify impeding an ongoing criminal investigation; "[c]ivil misuse can be raised in subsequent civil proceedings." S. Rep. No. 95-354, *supra*, at 7 n.12. See, *e.g.*, *In re Grand Jury Subpoenas, April, 1978 at Baltimore, supra*, 581 F.2d at 1110 n.16; *In re Special March 1974 Grand Jury, supra*, 541 F.2d at 170, 172; *In re Grand Jury Proceeding*, 528 F.2d 983, 984 (5th Cir. 1976); *Witte* v. *United States*, 544 F.2d 1026, 1029 (9th Cir. 1976); *Coson* v. *United States, supra*, 533 F.2d at 1120.

Finally, contrary to petitioner's assertion (Pet. 20-21), the fact that Piliaris is an Internal Revenue Service employee detailed to the Department of Justice does not create an inherent conflict of interest requiring his disqualification. At all times, Piliaris served a single client—the United States—and there is no question of misuse of attorney-client confidences (Canon 4, *ABA Code of Profcssional Responsibility*) or of conflicting allegiances that would impair his independent professional judgment (Canon 5, *ABA Code of Professional Responsibility*). *In re Perlin*, *supra*, slip op. 7-9. Piliaris' participation in the grand jury investigation after having recommended the investigation no more threatens to undermine the fun-

damental fairness or independence of the grand jury than permitting a similarly-situated Assistant United States Attorney to conduct a grand jury investigation. *Id.* at 9-10; *United States* v. *Dondich*, *supra*, 460 F. Supp. at 857. See also H.R. Rep. No. 2901, *supra*. As the Seventh Circuit observed in terms equally appropriate to this case, "A *per se* rule against the use of agency attorneys to conduct grand jury investigations [as posited by the petitioner] would be an act of needless caution and would erect just such barriers between the facets of the criminal justice system as Congress intended to avoid." *In re Perlin*, *supra*, slip op. 13-14, citing *United States* v. *LaSalle National Bank*, No. 77-365 (June 19, 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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